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02nd May 2006

Ms. Cathryn Geraghty
Commission For Aviation Regulation
Alexandra House
Earlsfort Terrace
Dublin 2

RE: SUBMISSION OF AER LINGUS TO THE CONSULTATION ON THE INTRODUCTION OF SANCTIONS UNDER ARTICLE 14.5 OF EU REGULATION 95/93 (AS AMENDED) ON COMMON RULES FOR THE ALLOCATION OF SLOTS AT COMMUNITY AIRPORTS (CP2/2006)

Dear Ms. Geraghty,

In relation to the above, please find attached Aer Lingus' submission on CP2/2006. A hard copy will follow by post.

Yours faithfully,

Laurence Gourley
Manager Legal Affairs

SUBMISSION OF AER LINGUS TO THE CONSULTATION ON THE INTRODUCTION OF SANCTIONS UNDER ARTICLE 14.5 OF EU REGULATION 95/93 (AS AMENDED) ON COMMON RULES FOR THE ALLOCATION OF SLOTS AT COMMUNITY AIRPORTS (CP2/2006)

Aer Lingus welcomes the opportunity to participate in the above consultation process initiated by the Commission in Consultation Paper (CP2/2006). The introduction of a sanctions regime in accordance with Article 14.5 of Regulation 95/93 as amended (the "Regulation") is essential to ensure the proper functioning of the coordination process at Dublin Airport. We would emphasise the urgent need for effective sanctions to be put in place. Article 14(5) of the Regulation has been in force since 31 July 2005 and, as a result, Ireland is currently in default of its obligations under the Regulation. In addition to this legal imperative, sanctions are also required as a practical matter in order to avoid unnecessary disruption to passengers and other operators during the coming summer season.

The following sets out our views in relation to the specific matters raised by the Commission in its Consultation Paper.

1. **What do respondents believe ought constitute repeated and intentional operation of air services at a time significantly different from the allocated slot?**

Aer Lingus believes that the interpretation of the various requirements of Article 14.5 should be left to the reasonable discretion of enforcement body (i.e. the coordinator (see response to Question 3 below)). We believe that the various requirements are interlinked and cannot be looked at in isolation.

(i) Repeated

This will be a matter of evidence to be assessed in each case by the coordinator in view of the specific circumstances of the alleged abuse taking account of all relevant factors such as the level of prejudice to other operators and aircraft operations. Clearly, the abuse should have occurred or be likely to occur more than once. However, the coordinator should not be obliged to wait for a minimum number of abuses before imposing a sanction. For example, the coordinator should be able to act if it is clear that a carrier intends to engage in repeated abuse (e.g. by reference to the carrier's published schedule).

(ii) Intentional

There are a number of ways in which the coordinator might establish evidence of intent on the part of the carrier. For instance, the frequency of slot abuse is clearly relevant to the issue of intent on the part of the operator concerned in that the greater the number of abuses, the greater the likelihood that such abuses are intentional. The published schedules of a carrier might also provide strong evidence of a carrier's intention to engage in slot abuse. The assessment of whether any abuse is intentional should be left to of the coordinator to determine case by case basis taking account of all relevant evidence.

(iii) Slots operated at different times significantly different or in a significantly different way from the allocated slot

Article 14.5 requires that slots must be operated at times significantly different from the allocated slots or in a significantly different way (e.g. by a different aircraft type) from that indicated at the time of allocation. To avoid any loophole in the sanctions regime, we believe that it is also necessary ensure that sanctions may also be applied to operations performed without a slot – this is also classified as intentional misuse of allocated slots in the IATA Scheduling Guidelines (WSG) (see paragraph 3.1 of CP2/2006).

As to the interpretation of what constitutes "significantly " in this context, we are again of the view that this should be left to the reasonable discretion of the coordinator. However in order to ensure transparency in the process, the legislation might require the coordinator to draw up guidelines, having consulted with the Coordination Committee, indicating how it intends to interpret this criterion. We would suggest that any assessment as to whether slots have been operated at significantly different times from the allocated slots, should include (i) a comparison of the allocated slots against the carrier's distributed schedule available for sale and (ii) a statistical analysis of actual operational performance of the carrier concerned. We believe that a tolerance of +/- 10 minutes from the allocated slot time only should be accepted in the time difference between distributed schedules available for sale and allocated slots. Any greater variance would, in our view, constitute an intent to operate at a time significantly different from the allocated slot.

In monitoring actual operations after the fact, 'significantly different' should be defined as an average difference between actual and allocated times that falls outside of a slot tolerance range by a statistically significant amount. For instance, in the case of UK airports coordinated by ACL, the slot tolerance ranges are : Arrivals -20 to +30 minutes and Departures -10 to +30 minutes. Aer Lingus believes that the most appropriate tolerances that should apply at Dublin Airport should be set out in guidelines drawn up by the coordinator.

2. What do respondents believe constitutes prejudice to airport operations? How should this be measured or identified?

The requirement that prejudice be caused to airport or air traffic operations needs to be interpreted broadly. Again, we believe that this should be left to the reasonable discretion of the coordinator. Given that carriers plan their schedules and take decisions regarding routes and aircraft investment well in advance based on the slots allocated by the coordinator, commercial prejudice will inevitably arise to those carriers complying with the coordination parameters if a competing carrier repeatedly and intentionally infringes the slot allocation process. As a consequence, we believe that any repeated and intentional slot abuse by definition causes prejudice to the interests of other operators and, where there is clear evidence of a carrier's intention to engage in repeated slot abuse (e.g. by reference to the carrier's published schedule), the coordinator should be empowered to take action in advance of any actual slot abuse.

Regard should also be had to the actual and potential consequences of slot abuse such as delays or inconvenience to other operators / passengers, excessive congestion at the airport, etc.

3. Do respondents agree that the Coordinator is best placed to decide if prejudice has occurred? Should the Coordinator consult with other parties at the airport before making this finding?

As the coordinator appointed by the Commission has the necessary expertise and will be monitoring slot compliance on an ongoing basis as an integral part of its responsibilities, it should be the appropriate body to administer the sanction regime. It is also independent of the airport authority and the various operators. However, as stated below in response to Question 5, the coordinator should also be empowered to require the airport authority and the IAA to provide assistance in enforcing the slot allocation process.

For any sanctions to be effective in their stated objective of preventing prejudice to the airport or air traffic operations, it is essential that the coordinator be in a position to act swiftly. However, we believe that the coordinator should afford all interested parties (particularly the carrier allegedly engaging in slot abuse and other carriers operating at the airport), the opportunity to give their views prior to any sanctions being imposed.

4. Should the Coordinators decision be subject to review? For example, by the Slot Coordination Committee or should the decision of the Coordinator be reviewed by a different body?

We believe that natural justice and fair procedures may require there to be a review or appeal process in relation to any sanctions imposed by the coordinator. Any such process must be independent of all interested parties and should be concluded within a very short period of time. A lengthy appeal process could render the enforcement regime meaningless and potentially lead to chaos in the interim period. It is therefore essential that carriers be obliged to comply with any directions issued by the coordinator pending the outcome of the review / appeal process. We do not consider that the Slot Coordination Committee is the appropriate body for this purpose as it is not independent of the carriers / airport authority and conflicts of interest may arise. Instead, we would suggest that the Commission should be empowered to appoint an independent expert for this purpose.

5. Do respondents feel that the proposed penalty per flight for non-compliance with the slot coordination process is appropriate? If not, suggested alternative penalties should be set out in replies.

Article 14(5) states that any sanctions or equivalent measures should be "effective, proportionate and dissuasive". We believe that these objectives are best achieved by a combination of financial and non-financial sanctions. We do not consider that criminal sanctions are appropriate and any financial penalties should be administrative in nature. The level of €5,000 per offending flight proposed by the Commission should serve as a maximum fine and the coordinator should have discretion to impose lesser fines taking account of all relevant factors such as the seriousness of the offence, the previous compliance record of the carrier concerned, the extent of prejudice caused to other operators etc.).

In addition, in order to ensure that effective action can be taken, a range of non-financial measures should be made available to the coordinator. In particular, we would suggest that the coordinator be given the power to issue a direction to cease an infringement and seek an order from the appropriate court in the event of non-compliance. Such an approach would be similar to the powers given to the Commission under Regulations 4, 5 and 6 of SI 274/2005

concerning the Denied Boarding Regulation. However, in order for such a measure to be effective, we believe that the time limits for compliance need to be shorter than those set out in SI 274/2005.

The coordinator should also be given the power to request the IAA to reject a carrier's flight plan in the event of non-compliance. Such a measure would be consistent with Article 14(1) of the Regulation. Consideration should also be given to enabling the coordinator to request the airport authority to provide assistance in enforcing the Regulation and to take such measures as are reasonably necessary (e.g. by withdrawing the use of airport facilities from an offending carrier) to prevent repeated and intentional operations within the meaning of Article 14(5).

6. Do respondents believe it is appropriate to deal with collection of penalties in the proposed summary fashion before the District Court if necessary?

As stated above, we believe that any financial penalties should be administrative rather than criminal in nature. However in default of payment of any penalty, we agree that the coordinator should be able to seek to recover any such sums in the District Court and that certification of the activity constituting abuse by the slot coordinator (having submitted its decision for independent review) should be considered as conclusive evidence in the absence of evidence to the contrary.